RICHARD B. STEWART
Assistant Attorney General
VALERIE ANN LEE
United States Department of Justice
Land & Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
(202) 633-2779

WILLIAM T. McGIVERN
United States Attorney
Northern District of California

PAUL LOCKE
Assistant United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102
(415) 556-1126

Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. TBG INC. and INDIAN HEAD INDUSTRIES, INC. Defendants.	CIVIL ACTION NO. 89-4047 JPV

EXHIBITS SUBMITTED IN SUPPORT OF
UNITED STATES' MOTION FOR ENTRY OF CONSENT DECREE

TABLE OF CONTENTS

EXHIBIT 1

States), that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted these investigations effective August 2, 1989, following preliminary determinations by the Department of Commerce that imports of certain small business telephone systems and subassemblies thereof from Japan, Korea, and Taiwan were being sold at LTFV within the meaning of section 735 of the act (19 U.S.C. 1673d(a)). Notice of the institution of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the Federal Register of August 16, 1989 (54 FR 33783). The hearing was held in Washington, DC, on October 31, 1989, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on November 29, 1989. The views of the Commission are contained in USITC Publication 2237 (November 1989), entitled "Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan: Determinations of the Commission in Investigations Nos. 731–TA–426 and 428 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations."

By Order of the Commission.

Issued: December 1, 1989.

Kenneth R. Mason,

Secretary.

[FR Doc. 89–28510 Filed 12–5–89; 8:45 am]

BILLING CODE 7020–02–M

INTERSTATE COMMERCE COMMISSION

[Ex Parte No. 399]

Cost Recovery Percentage

AGENCY: Interstate Commerce Commission.

ACTION: Publication of cost recovery percentage.

SUMMARY: Section 202 of the Staggers Rail Act of 1980 requires the Commission to calculate an annual Cost Recovery Percentage (CRP) for all railroad traffic. The CRP is a revenue to variable cost percentage calculated using railroad unit costs and a statistical sample of railroad traffic. If the CRP falls between 170 percent and 180 percent it becomes the jurisdictional threshold for rate regulation of market dominant traffic. The Commission found that the CRP for both 1986 and 1987 was in excess of 180 percent. The jurisdictional threshold remains at 180 percent of variable costs.

EFFECTIVE DATE: December 6, 1989.

FOR FURTHER INFORMATION CONTACT: William T. Bono (202) 275–7354; Robert C. Hasek (202) 275–0938; (TDD for hearing impaired (202) 275–1721).

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision write to Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423, or telephone (202) 289–4357 or 4359. Assistance for the hearing impaired is available through TDD services (202) 275–1721 or by pickup from Dynamic Concepts, Inc., Room 2229 at Commission Headquarters.

This action will not significantly affect either the quality of the human environment or energy conservation. It will not have a significant impact on a substantial number of small entities.

Authority: 49 U.S.C. 10321, 10709, 5 U.S.C. 553.

Decided: November 29, 1989.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Lamboley, Phillips, and Emmett.

Noreta R. McGee,

Secretary.

[FR Doc. 89–28502 Filed 12–5–89; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act

In accordance with Departmental policy, 28 CFR 50.7, and 42 U.S.C. 9622(d)(2), notice is hereby given that on November 22, 1989 a proposed consent decree in *United States* v. *TBG Inc. and Indian Head Industries, Inc.*, Civil Action No. was lodged with the United States District Court for the Northern District of California. The complaint filed by the United States, under sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act, as amended, alleged that defendant TBG Inc. is the owner of property and the improvements which are a part of *the MGM Brakes Site ("the facility") in* Cloverdale, California and that TBG Inc. is the successor in interest to corporations that owned and operated the facility at times when hazardous substances were disposed. The complaint also alleges that Indian Head Industries, Inc. is the operator of a casting plant at the facility. The complaint further alleges that there have been releases of hazardous substances into the environment from the facility, which releases have caused the United States to incur response costs; and that there is or may be an imminent and substantial endangerment to the public health, welfare, or the environment because of the actual or threatened releases. The complaint sought injunctive relief to require the defendant to abate and remedy the imminent and substantial endangerment and the effects of the actual or threatened releases from the facility. The complaint also sought the reimbursement of past costs which were incurred by the United States in responding to the actual or threatened releases. The consent decree requires the defendants to implement fully the remedy selected by the Environmental Protection Agency as set forth in the Record of Decision, dated September 29, 1988. More specifically the defendants will be required to excavate PCB-contaminated soil at the Site and properly dispose of the excavated soil on at off-site landfill operating in compliance with the Resource, Conservation, and Recovery Act and/or the Toxic Substances Control Act. The defendants are also required to clean up the groundwater to specified levels under the consent decree. The defendants will pay all future costs at the Site, and pay past costs in an amount of $823,119.55. Under the consent decree the United States will provide the defendants a covenant not to sue with a release as to off-site PCB disposal pursuant to 42 U.S.C. 9622(f)(2)(A).

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Chief, Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, P.O. Box 7611, Washington, DC 20044, and should refer to *United States* v. *TBG Inc. and Indian Head Industries, Inc.* D.J. Ref. 90–11–2–188.

A copy of the proposed consent decree may be examined at the office of the United States Attorney, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, 94102

or at the Region IX office of the Environmental Protection Agency, 215 Fremont Street, San Francisco, California, 94105, and at the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Room 1517, Ninth Street and Pennsylvania Avenue NW., Washington, DC. A copy of the proposed consent decree may be obtained in person from the Department of Justice at the above address or by mail from the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, P.O. Box 7611, Washington, DC 20044. When requesting a copy, please refer to *United States* v. *TBG Inc. and Indian Head Industries, Inc.* D.J. Ref. 90-11-2-188 and enclose a check in the amount of $40.40 (10 cents per page reproduction cost) payable to the Treasurer of the United States.

Richard B. Stewart,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89-28496 Filed 12-5-89, 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Summary of Decisions Granting In Whole or In Part Petitions for Modification

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice of affirmative decisions issued by the Administrators for Coal Mine Safety and Health and Metal and Nonmetal Mine Safety and Health on petitions for modification of the application of mandatory safety standards.

SUMMARY: Under section 101(c) of the Federal Mine Safety and Health Act of 1977, the Secretary of Labor may modify the application of a mandatory safety standard to a mine if the Secretary determines either or both of the following: That an alternate method exists at a specific mine that will guarantee no less protection for the miners affected than that provided by the standard, or that the application of the standard at a specific mine will result in a diminution of safety to the affected miners.

Summaries of petitions received by the Secretary appear periodically in the Federal Register. Final decisions on these petitions are based upon the petitioner's statements, comments and information submitted by interested persons and a field investigation of the conditions at the mine. The Secretary has granted or partially granted the requests for modification submitted by the petitioners listed below. In some instances the decisions are conditioned upon compliance with stipulations stated in the decision.

FOR FURTHER INFORMATION CONTACT: The petitions and copies of the final decisions are available for examination by the public in the Office of Standards, Regulations and Variances, MSHA, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Dated: November 29, 1989.

Affirmative Decisions on Petitions for Modification

Docket No.: M-85-6-C.
FR Notice: 50 FR 13891C.
Petitioner: Nowacki Coal Company.
Reg Affected: 30 CFR 75.301.
Summary of Findings: Proposed airflow reduction, which would maintain a safe and healthful atmosphere, considered acceptable alternate method. Granted with conditions.

Docket No.: M-85-8-C.
FR Notice: 50 FR 13892.
Petitioner: Picklands Mather and Company.
Reg Affected: 30 CFR 75.503.
Summary of Findings: Use of metal locking devices, each consisting of a fabricated metal bracket and a metal locking screw, in lieu of padlocks for the purpose of locking battery plugs to machine-mounted battery-powered machines, considered acceptable alternate. Granted with conditions.

Docket No.: M-85-10-C.
FR Notice: 50 FR 13387.
Petitioner: Barnes and Tucker Company.
Reg Affected: 30 CFR 75.1100-0.
Summary of Findings: Petitioner's proposal to maintain a dry waterline along the slope belt conveyor, equipped with an automatic actuating valve considered acceptable alternate method. Granted with conditions.

Docket No.: M-85-45-C.
FR Notice: 50 FR 35614.
Petitioner: Jim Walter Resources, Inc.
Reg Affected: 30 CFR 75.1002.
Summary of Findings: Petitioner's proposal to use high-voltage cables (2,300 volt) to supply power to permissible longwall face equipment in or inby the last open crosscut considered acceptable alternate method. Granted with conditions.

Docket No.: M-85-77-C.
FR Notice: 50 FR 35615.
Petitioner: Plateau Mining Company.
Reg Affected: 30 CFR 75.326.
Summary of Findings: Petitioner's proposal to develop the coal mine with a two-entry longwall development system, to use the belt entry as a separate intake split or air to the longwall face, and to provide the belt intake entry with an environmental monitoring system for low-level carbon monoxide monitoring considered acceptable alternate method. Granted with conditions.

Docket No.: M-85-96-C.
FR Notice: 51 FR 33612.
Petitioner: S. and T. Coal Company.
Reg Affected: 30 CFR 75.1714.
Summary of Findings: Petitioner's proposal to use filter-type self-rescuers in lieu of self-contained self-rescuers considered acceptable alternate method. Granted with conditions.

Docket No.: M-85-119-C.
FR Notice: 51 FR 36491.
Petitioner: R. S. and W. Coal Company.
Reg Affected: 30 CFR 75.1714.
Summary of Findings: Petitioner's proposal to use filter-type self-rescuers in lieu of self-contained self-rescuers considered acceptable alternate method. Granted with conditions.

Docket No.: M-85-126-C.
FR Notice: 51 FR 36490.
Petitioner: Buck Mountain Coal Company.
Reg Affected: 30 CFR 75.1714.
Summary of Findings: Petitioner's proposal to use filter-type self-rescuers in lieu of self-contained self-rescuers considered acceptable alternate method. Granted with conditions.

Docket No.: M-85-155-C.
FR Notice: 50 FR 47293.
Petitioner: National Mines Corporation.
Reg Affected: 30 CFR 75.1710.
Summary of Findings: Use of cabs or canopies on the mine's electric face equipment in specified low mining heights would result in a diminution of safety. Granted.

Docket No.: M-85-202-C.
FR Notice: 51 FR 10697.
Petitioner: River Processing, Inc.
Reg Affected: 30 CFR 75.1710.
Summary of Findings: Use of cabs or canopies on the mine's electric face equipment in specified low mining heights would result in a diminution of safety. Granted.

Docket No.: M-85-85-207-C.
FR Notice: 51 FR 10697.
Petitioner: Peabody Company.
Reg Affected: 30 CFR 75.305.
Summary of Findings: Petitioner's proposal to establish measurement stations where the air quality and quantity will be measured and where

EXHIBIT 2

Dee & Olleene Reynolds
1185 S. Cloverdale Blvd.
Cloverdale, California 95425

January 3, 1990

Chief, Environmental Enforcement Section
Land & Natural Resources Division
Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Re: United States v. TBG Inc. and Indian Head Industries, Inc.; D.J. Ref 90-11-2-188; "MGM Brake Superfund Site at Cloverdale California" - CFR Notice Dec. 6,1989.

Dear Sirs/Madams:

This letter is in response to the referenced notice and item, and seeks both clarification and, if possible, specific considerations for neighboring property owners in the referenced proposed decree.

First, the referenced decree and documents were not available in the Cloverdale Library nor at 215 Fremont in San Francisco as stated. We request that you mail out a copy of the decree and any changes to the proposed remedy to those parties on the mailing list that has been used for the last eight years free of cost.

Secondly, if the decree is to be finalized, we request that reasonable relocation cost to ourselves and other neighbors desiring such during the time of excavation and hauling of contaminated materials be provided or alternatively a process provided for reverse condemnation for properties within 500 feet of the activity. This problem and its slow resolution has caused severe stress on our family and both myself and my husband have had to deal with cancer illness while this matter drags on within the federal governments jurisdiction.

Third, our property which is immediately adjacent is used for vegetable farming and provides a considerable amount of organically

grown food for our extended family. Specifically, we request that the decree insure protection during the excavation, hauling and subsequently to our property for its historic use which is gardening. We have written repeatedly during the process asking that the property noted as pasture to the northwest be properly indicated on decree documents. At last review this still had not been accomplished on EPA documents in spite of written requests by us. There is also a large subdivision just to the north now, which includes condominiums facing the site!

Fourth, we ask that the decree incorporate adequate assurance of monitoring during the excavation and hauling to determine effects upon neighboring property and the proper use, or uses that should not occur during this time period. We are especially concerned about fugitive dust and its long and short term effects upon our gardening. The residual 10 ppm level of PBB's is also of concern.

We do not desire to delay the process, but believe these issues are serious matters that should be resolved by our government prior to making any covenants not to sue for the burden their actions have caused and will likely cause to our neighbors and ourselves.

Sincerely,

Dee Reynolds Olleene Reynolds

Dee and Olleene Reynolds

EXHIBIT 3

Dale M. Timmons
303 Parkplace, Suite 126
Kirkland, WA 98033

January 4, 1990

Chief, Environmental Enforcement Section
Land & Natural Resource Division
Department of Justice
P.O. Box 7611
Washington, D.C. 20044

SUBJECT: COMMENTS ON THE PROPOSED REMEDIATION ALTERNATIVE FOR THE MGM BRAKES SUPERFUND SITE, CLOVERDALE, CA

To whom it may concern:

The selection of excavation and off-site disposal of PCB-contaminated soil at the MGM Brakes Site as the preferred remedial alternative is not consistent with the goals and aspirations of the EPA, California State Department of Health Services or those of us who are in favor of protecting the environment. The proposed alternative does not in any way comply with the mandated preference under SARA for remedial alternatives that permanently reduce the mobility toxicity or volume of the waste and that can be accomplished on-site and in situ.

This alternative, while not requiring long term monitoring at the site, will require long term monitoring at the selected dumping site and will represent long-term liability for the responsible party; all at a price for which permanent destruction could be accomplished. In addition all landfills will eventually leak and the contained waste will require remediation again. Does it really make sense to "clean up" the site twice.

On-site incineration is not the only destruction technology available these days. There are many other technologies which will accomplish PCB destruction for the same price as that which was published for land disposal on this site.

It is apparent that the local residents at the site have the all too common double standard of being fervent advocates of the environment but willing to ship the still toxic waste to the back yard of someone else. Out of sight, out of mind. They apparently do not care what happens to the waste as long as it goes over the horizon or at least to the next neighborhood. It is also unfortunate that the local residents have been able to bludgeon their double standard upon the delicate bureaucrats of the state of California and EPA Region 9.

90-11-2-180

The state and the EPA need to rethink their decision of land disposal and destroy the PCBs that are contaminating the soil on this site. The era of moving waste around simply to postpone the expenditures of a real cleanup is past. Do it right the first time.

Sincerely,

Dale Timmons

Dale M. Timmons

EXHIBIT 4

PUBLIC VOUCHER FOR ADVERTISING

For Agency Use Only

DEPARTMENT OR ESTABLISHMENT, BUREAU OR OFFICE
California Newspaper Service Bureau, Inc.

VOUCHER NUMBER

PLACE VOUCHER PREPARED
San Francisco, CA

DATE PREPARED
1/17/90

SCHEDULE NUMBER

NAME OF PUBLICATION
Press Democrat

PAID BY

NAME OF PUBLISHER OR REPRESENTATIVE
California Newspaper Service Bureau, Inc.

ADDRESS (Street, room number, city, State, and ZIP code)
10 United Nations Plaza, #410, S.F., CA 94102

CHARGES

TYPEFACE

(size of type)

POINT PER (inch, square, word, or folio)

Line Rates

	NUMBER OF LINES (Indicate agate or space)	COST PER LINE	TOTAL COST
FIRST INSERTION	168 lines	$ @.77 p/line	$ 129.36
ADDITIONAL INSERTIONS · GIVE NUMBER ▶	TYPESETTING CHARGE SPECIAL DISPATCH		59.60 15.00
TOTAL			$ 203.96

Other Rates

	NUMBER OF UNITS (Indicate inch, square, word, folio)	COST PER UNIT	TOTAL COST
FIRST INSERTION		$	$
ADDITIONAL INSERTIONS GIVE NUMBER ▶			
TOTAL			$

Attach one copy of advertisement (including upper and lower rules) to each copy of voucher here. If copy is not available sign the following affidavit.

TOTAL LINE RATES AND OTHER RATES	
LESS DISCOUNT AT %	
BALANCE DUE	$
VERIFIED (Initials)	

AFFIDAVIT

This represents a true billing for the attached advertising order, with specifications and copy, which has been completed.

SIGNATURE OF PUBLISHER OR REPRESENTATIVE
Denise M. Cordoni

TITLE
Denise M. Cordoni, Sales Assistant

DATE
1/17/90

FOR AGENCY USE ONLY

ADVERTISEMENT PUBLISHED IN	DATE PUBLISHED
I certify that the advertisement described above appeared in the named publication and that this account is correct and eligible for payment.	
SIGNATURE AND TITLE OF CERTIFYING OFFICER	DATE
SIGNATURE AND TITLE OF AUTHORIZING OFFICER	DATE
ACCOUNTING CLASSIFICATION	PAID BY CHECK NUMBER

PROOF OF PUBLICATION

(2015.5 C.C.P.)

This space for County Clerk's Filing Stamp

STATE OF CALIFORNIA

County of Sonoma

I am a citizen of the United States and a resident of the country aforesaid: I am over the age of eighteen years, and not a party or interested in the above entitled matter. I am the principal clerk of the printer of Tl Press Democrat, a newspaper of gener circulation, printed and published DAII IN THE City of Santa Rosa, County of So oma; and which newspaper has been a judged a newspaper of general circulatic by the Superior Court of the County Sonoma, State of California, under the da of November 29, 1951, Case number 3483 that the notice, of which the annexed is printed copy (set in type not smaller tha nonpareil), has been published in eac regular and entire issue of said newspap and not in any supplement thereof on th following dates to wit:

December 18,

all in the year 19..89..

I certify (or declare) under penalty of pe jury, under the laws of the State of Califo nia, that the foregoing is true and correc Dated at Santa Rosa, California, this

18th day of December,

19..89..

Rosemary L. Reeves

SIGNATURE

Proof of Publication of

U.S. ENVIRONMENTAL PROTECTION AGENCY ANNOUNCES FILING OF CONSENT DECREE AND THIRTY-DAY PUBLIC COMMENT PERIOD FOR MGM BRAKES SUPERFUND SITE IN CLOVERDALE, CA.

December 1989

The U.S. Environmental Protection Agency (EPA) is announcing filing of a consent decree for design and implementation of a cleanup plan for soil and groundwater contamination at the MGM Brakes Superfund site in Cloverdale, CA.

The soil at the MGM Brakes Superfund site is contaminated with polychlorinated biphenyls, or PCBs, used as a fluid in the brake casting operations. Wastewater containing PCBs was then discharged into a field south of the plant. The MGM Brakes site is located on U.S. Highway 101 in south Cloverdale.

In September 1988 EPA selected excavation and redisposal of contaminated soils at a waste disposal facility as the method to clean up the soil. In addition, further monitoring and additional studies will be conducted.

The Consent Decree, which is an agreement between the potentially responsible parties and EPA, outlines how and when the potentially responsible parties will do the clean-up under EPA oversight.

Public Comment Period

EPA is holding a 30-day public comment period extending through January 5, 1990. Comments on the Consent Decree may be sent to:

Chief, Environmental Enforcement Section
Land and Natural Resources Division
Department of Justice
P.O. Box 7611
Washington D.C. 20044
DJ Reference No. 90-11-2-188

For More Information

A copy of the Consent Decree as well as other site-related documents may be found in the local repositories

Cloverdale Regional Library
401 North Cloverdale Blvd.
Cloverdale, CA 95425
(707) 894-5271

If you have any questions or would like further information about the MGM Brakes Superfund site, please contact:

Michael Wolfram
Remedial Project Manager
215 Fremont Street (H-7-1)
San Francisco, CA. 94105

You may call and leave a message on EPA's Toll-Free Information Line (800) 231-3075.

No. Q24728 10698—Pub. Dec. 18, 1989 1-6

California Newspaper Service Bureau, Inc.

PUBLIC NOTICE ADVERTISING CLEARING HOUSE - ESTABLISHED 1934
P.O. Box 31
Los Angeles, California 90053
(213) 625-2541
Offices in Los Angeles, Sacramento, San Diego, San Francisco, & Santa Ana

40C **INVOICE NO:** Q 24728

DATE 12/27/89

EPA/FINANCIAL MGMT OFFICE Z98100
ENVIRONMNTL PROTECTN AGCY
ATTN: Janice Hicks
215 FREMONT ST
SAN FRANCISCO CA 94105

OTICE DISPLAY MISCELLANEOUS

ON MGM Brakes Superfund Site

IN THE PRESS DEMOCRAT PUBLICATION DATES 12/18

DESCRIPTION OF CHARGES					AMOUNT
VERTISING:	168.000	LINES	@ .770	129.36	129.36
PESETTING CHG.					59.60
ECIAL DISPATCH					15.00

RECEIVED
JAN 22 1990
Office of Comptroller
U.S. EPA, Region 9

FY90 FY90 FY90
90001983389

2/6/90

TOTAL DUE Pay This Amount 203.96

CHECK PAYABLE TO: California Newspaper Service Bureau, Inc.

ORIGINAL INVOICE PLEASE RETURN ONE COPY WITH YOUR PAYMENT

EXHIBIT 5

PUBLIC VOUCHER FOR ADVERTISING

For Agency Use Only

DEPARTMENT OR ESTABLISHMENT, BUREAU OR OFFICE
California Newspaper Service Bureau, Inc.

VOUCHER NUMBER

PLACE VOUCHER PREPARED
San Francisco, CA

DATE PREPARED
1/17/90

SCHEDULE NUMBER

NAME OF PUBLICATION
Healdsburg Tribune

PAID BY

NAME OF PUBLISHER OR REPRESENTATIVE
California Newspaper Service Bureau, Inc.

ADDRESS (Street, room number, city, State, and ZIP code)
10 United Nations Plaza, #410, S.F., CA 94102

CHARGES

TYPEFACE

(size of type)

POINT PER (inch, square, word, or folio)

Line Rates

	NUMBER OR LINES (Indicate inches or agate)	COST PER LINE	TOTAL COST
FIRST INSERTION	12 inches	$ #10.93 p/inch	$ 131.16
ADDITIONAL INSERTIONS GIVE NUMBER ▶	SPECIAL DISPATCH		15.00
TOTAL			$ 146.16

Other Rates

	NUMBER OF UNITS (Indicate inch, square, word, folio)	COST PER UNIT	TOTAL COST
FIRST INSERTION		$	$
ADDITIONAL INSERTIONS GIVE NUMBER ▶			
TOTAL			$

Attach one copy of advertisement (including upper and lower rules) to each copy of voucher here. If copy is not available sign the following affidavit.

TOTAL LINE RATES AND OTHER RATES	
LESS DISCOUNT AT %	
BALANCE DUE	$
VERIFIED (Initials)	

AFFIDAVIT

This represents a true billing for the attached advertising order, with specifications and copy, which has been completed.

SIGNATURE OF PUBLISHER OR REPRESENTATIVE
Denise M. Cordoni

TITLE
Denise M. Cordoni, Sales Assistant

DATE
1/17/90

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I certify that the advertisement described above appeared in the named publication and that this account is correct and eligible for payment.	
SIGNATURE AND TITLE OF CERTIFYING OFFICER	DATE
SIGNATURE AND TITLE OF AUTHORIZING OFFICER	DATE
ACCOUNTING CLASSIFICATION	PAID BY CHECK NUMBER

Love,
Sarah and Kevin Keeley
P.S. I love you, Santa.

Dear Santa,
I want you to surprise me. Maybe you will surprise me with a Barbie doll. I want Barbie furniture. Like a bed, some toys for Barbie, a boyfriend for Barbie and a desk for Barbie. Some funny Dr. Seuss books. A Barbie book and Berenstein Bear books.
Love, Amanda Machi

Dear Santa,
I want you to surprise me with fun toys. Merry Christmas!!!!!!
Love, Matthew Machi

Dear Santa, I love you. I would like some books please. And can you please get a present for Greydon please. He's six weeks old. Can you please get a present. Can you get him a bear please? Merry Christmas.
Love, Ben

Dear Santa,
I would like L.A. Gear jacket. And I would like L.A. Gear shoes. I would like a Take and Bake Oven. And I would like some toys. I would like some books and I would like some school bags.
Love, Rose Lenhardt

Dear Santa,
How are you? I am fine but anxiously awaiting your visit. Please bring me a Walkman and a walkie-talkie. I hope you have a safe and enjoyable trip.
Love, Ian

Dear Santa,
I would like a pair of animal mittens, a Lite Brite, Busy Beads, Barbie nail set and a sewing machine. And for my sister Erika, a water pet, ballerina doll and my sister Kristina a stuffed dog and riding horse and for each mittens.
Love, Vanessa Beeler

U.S. ENVIRONMENTAL PROTECTION AGENCY ANNOUNCES FILING OF CONSENT DECREE AND THIRTY-DAY PUBLIC COMMENT PERIOD FOR MGM BRAKES SUPERFUND SITE IN CLOVERDALE, CA.

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Cloverdale, CA 95425
(707) 894-5271

If you have any questions or would like further information about the MGM Brakes Superfund site, please contact:

Michael Wollram
Remedial Project Manager
215 Fremont Street (H-7-1)
San Francisco, CA. 94105

You may call and leave a message on EPA's Toll-Free Infomation Line (800) 231-3075.

California Newspaper Service Bureau, Inc.

PUBLIC NOTICE ADVERTISING CLEARING HOUSE — INCORPORATED 1934 40D

INVOICE NO: Q 24729

DATE 1/08/90

CHARGED TO
EPA/FINANCIAL MGMT OFFICE Z98100
ENVIRONMNTL PROTECTN AGCY
ATTN: Janice Hicks
215 FREMONT ST
SAN FRANCISCO CA 94105

RECEIVED
JAN 22 1990
Office of Comptroller
U. S. EPA, Region 9

PE OF NOTICE DISPLAY MISCELLANEOUS

SCRIPTION MGM Brakes Superfund Site

BLISHED IN THE HEALDSBURG TRIBUNE

PUBLICATION DATES 12/20

DESCRIPTION OF CHARGES					AMOUNT
ADVERTISING:	12.000	INCHES	@ 10.930	131.16	131.16
SPECIAL DISPATCH					15.00

FY90 FY90 FY90
90001983402

2/6/90

TOTAL DUE Pay This Amount 146.16

MAKE CHECK PAYABLE TO: California Newspaper Servic

ORIGINAL INVOICE PLEASE RETURN ONE WITH YOUR PAYMENT

EXHIBIT 6

PUBLIC VOUCHER FOR ADVERTISING

For Agency Use Only

DEPARTMENT OR ESTABLISHMENT, BUREAU OR OFFICE
California Newspaper Service Bureau, Inc.

VOUCHER NUMBER

PLACE VOUCHER PREPARED
San Francisco, CA

DATE PREPARED
1/16/90

SCHEDULE NUMBER

NAME OF PUBLICATION
Cloverdale Reveille

PAID BY

NAME OF PUBLISHER OR REPRESENTATIVE
California Newspaper Service Bureau, Inc.

ADDRESS (Street, room number, city, State, and ZIP code)
10 United Nations Plaza, #410 San Francisco, CA 94102

CHARGES

TYPEFACE (size of type) POINT (inch, square, word, or folio) PER

Line Rates	NUMBER OF LINES (Indicate inches or space)	COST PER LINE	TOTAL COST
FIRST INSERTION	12 Inches	$ @4.88 p/inch	$ 58.56
ADDITIONAL INSERTIONS GIVE NUMBER ▶	SPECIAL DISPATCH		15.00
TOTAL			$ 73.56

Other Rates	NUMBER OF UNITS (Indicate inch, square, word, folio)	COST PER UNIT	TOTAL COST
FIRST INSERTION		$	$
ADDITIONAL INSERTIONS GIVE NUMBER ▶			
TOTAL			$

Attach one copy of advertisement (including upper and lower rules) to each copy of voucher here. If copy is not available sign the following affidavit.

TOTAL LINE RATES AND OTHER RATES	
LESS DISCOUNT AT %	
BALANCE DUE	$
VERIFIED (Initials)	

AFFIDAVIT

This represents a true billing for the attached advertising order, with specifications and copy, which has been completed.

SIGNATURE OF PUBLISHER OR REPRESENTATIVE
Denise M. Cordoni

TITLE
Denise M. Cordoni, Sales Assistant

DATE
1/16/90

FOR AGENCY USE ONLY

ADVERTISEMENT PUBLISHED IN

DATE PUBLISHED

I certify that the advertisement described above appeared in the named publication and that this account is correct and eligible for payment.

SIGNATURE AND TITLE OF CERTIFYING OFFICER

DATE

SIGNATURE AND TITLE OF AUTHORIZING OFFICER

DATE

ACCOUNTING CLASSIFICATION

PAID BY CHECK NUMBER

California Newspaper Service Bureau, Inc.
Incorporated 1934
120 West Second Street
Los Angeles, California 90012
(213) 625-2541

DECLARATION

I am a resident of Los Angeles County, over the a
eighteen years and not a party to or interested in the n
noticed.

The notice, of which the annexed is a printed
appeared in the:

CLOVERDALE REVEILLE

on the following dates:

DECEMBER 20, 1989

I certify (or declare) under penalty of perjury th
foregoing is true and correct.

Dated at Los Angeles, California, this 5th
JANUARY, 19 90.

Signature

More Than 50 YEARS OF SERVICE California Newspaper Service Bureau

U.S. ENVIRONMENTAL PROTECTION AGENCY ANNOUNCES FILING OF CONSENT DECREE AND THIRTY-DAY PUBLIC COMMENT PERIOD FOR MGM BRAKES SUPERFUND SITE IN CLOVERDALE, CA.

December 1989

The U.S. Environmental Protection Agency (EPA) is announcing filing of a consent decree for design and implementation of a cleanup plan for soil and groundwater contamination at the MGM Brakes Superfund site in Cloverdale, CA.

The soil at the MGM Brakes Superfund site is contaminated with polychlorinated biphenyls, or PCBs, used as a fluid in the brake casting operations. Wastewater containing PCBs was then discharged into a field south of the plant. The MGM Brakes site is located on U.S. Highway 101 in south Cloverdale.

In September 1988 EPA selected excavation and redisposal of contaminated soils at a waste disposal facility as the method to clean up the soil. In addition, further monitoring and additional studies will be conducted.

The Consent Decree, which is an agreement between the potentially responsible parties and EPA, outlines how and when the potentially responsible parties will do the clean-up under EPA oversight.

Public Comment Period

EPA is holding a 30-day public comment period extending through January 5, 1990. Comments on the Consent Decree may be sent to:

Chief, Environmental Enforcement Section
Land and Natural Resources Division
Department of Justice
P.O. Box 7611
Washington D.C. 20044
DJ Reference No. 90-11-2-188

For More Information

A copy of the Consent Decree as well as other site-related documents may be found in the local repositories

Cloverdale Regional Library
401 North Cloverdale Blvd.
Cloverdale, CA 95425
(707) 894-5271

If you have any questions or would like further information about the MGM Brakes Superfund site, please contact:

Michael Wolfram
Remedial Project Manager
215 Fremont Street (H-7-1)
San Francisco, CA. 94105

You may call and leave a message on EPA's Toll-free Information Line (800) 231-3075.

California Newspaper Service Bureau, Inc.

PUBLIC NOTICE ADVERTISING CLEARING HOUSE — INCORPORATED 1934 40A

INVOICE NO: Q 24730

DATE 1/08/90

CHARGED TO
EPA/FINANCIAL MGMT OFFICE Z98100
ENVIRONMNTL PROTECTN AGCY
ATTN: Janice Hicks
215 FREMONT ST
SAN FRANCISCO CA 94105

E OF NOTICE DISPLAY MISCELLANEOUS

CRIPTION MQM Brakes Superfund Site

LISHED IN CLOVERDALE REVEILLE PUBLICATION DATES 12/20

DESCRIPTION OF CHARGES					AMOUNT
ADVERTISING:	12.000	INCHES	@	4.880	58.56
SPECIAL DISPATCH					15.00

RECEIVED
JAN 22 1990
Office of Comptroller
U.S. EPA, Region 9

FY90 FY90 FY90
90001983372

2/6/90

TOTAL DUE Pay This Amount 73.56

MAKE CHECK PAYABLE TO: California Newspaper Service Bureau, Inc.

ORIGINAL INVOICE PLEASE RETURN ONE WITH YOUR PAYMENT

EXHIBIT 7

McCUTCHEN, DOYLE, BROWN & ENERSEN
COUNSELORS AT LAW
THREE EMBARCADERO CENTER
SAN FRANCISCO, CALIFORNIA 94111
TELEPHONE (415) 393-2000

SAN JOSE
WALNUT CREEK
COSTA MESA
WASHINGTON, D C
SHANGHAI
TAIPEI

SAN FRANCISCO OFFICE
TELEX 340817 MACPAG SFC
FACSIMILE GI. II AND III
(415) 393-2286

December 11, 1989

VIA FEDERAL EXPRESS

Cloverdale Public Library
401 North Cloverdale Boulevard
Cloverdale, California 95425

MGM Brakes Superfund Site
Cloverdale, California

Dear Sir or Madam:

As you requested, enclosed please find copies of the Consent Decree proposed for the MGM Brakes Superfund Site. Please let us know if we can be of any assistance in answering questions you may have about these documents.

Very truly yours,

McCUTCHEN, DOYLE, BROWN & ENERSEN

By B Alexander

Beverly Z. Alexander

Enclosures

EXHIBIT 8

OUTSIDE MESSENGER AND COURIER CHARGE

(✓) S.F. ( ) S.J. ( ) D.C. ( ) W.C. ( ) Other

( ) Pickup (✓) Delivery ( ) Round Trip ( ) Filing (Round Trip)

CLIENT NO. 14481 NAME MGM Brakes

MATTER NO. 2 NAME

PERSONAL NO. NAME

FIRM NO. 7230 ( ) DESCRIBE

NAME Cloverdale Public Library

COMPANY 401 North Cloverdale Blvd.

STREET (Rm., Ste., Fl.) Cloverdale, CA 95425

CITY, STATE, ZIP

CLIENT CHARGES: Air or Express Delivery ( ) Code 02 or ( ) 41

Local Messenger/Delivery ( ) Code 16 or ( ) 59

NARRATIVE TO APPEAR ON CLIENT STATEMENT

SPECIAL INSTRUCTIONS

REQUESTED BY B. Murray TIMEKEEPER NO. 876

PROVIDE AIRBILL NUMBER OF COURIER SERVICE USED:

FEDERAL EXPRESS* 3321929502 CUSTOMER PACKAGE TRACKING NUMBER — PULL UP PURPLE TAB

EXPRESS MAIL

NETWORK

OTHER (Name)

*al, Saturday service, and
ken to the mailroom after
5:15 p.m. must have a completed
airbill.)

DATE 12/11/09

MAILROOM USE ONLY:

Western No.

Time called in

Time out

Time returned

Total

OTES	AIRBILL #	SVC	WGT	NET CHG
UBTOTALS FOR 11543-057				
ACKAGE COUNT 1				
ACKAGE CHARGES $15.00				
ISCOUNT RECEIVED $6.25				
PECIAL FEES $0.00				
'OTAL CHARGES $8.75				
OTAL WEIGHT 1				
3654-003/WALL	3320739511	CPB	008	27.60
UBTOTALS FOR 13654-003				
'ACKAGE COUNT 1				
ACKAGE CHARGES $40.00				
)ISCOUNT RECEIVED $12.40				
PECIAL FEES $0.00				
'OTAL CHARGES $27.60				
'OTAL WEIGHT 8				
.4482-002/MURRAY	3321929511	CPB	006	23.80
4482-002/MURRAY	3321929502	CPB	006	23.80
SUBTOTALS FOR 14482-002				
'ACKAGE COUNT 2				
'ACKAGE CHARGES $69.00				
)ISCOUNT RECEIVED $21.40				
SPECIAL FEES $0.00				
'OTAL CHARGES $47.60				
'OTAL WEIGHT 12				
.4974-001/ALLISON	3321929554	OL	001	8.75
SUBTOTALS FOR 14974-001				
'ACKAGE COUNT 1				
'ACKAGE CHARGES $15.00				
)ISCOUNT RECEIVED $6.25				
SPECIAL FEES $0.00				
'OTAL CHARGES $8.75				
'OTAL WEIGHT 1				
.5267-020/SAKOL	3320561833	OL	001	8.75
SUBTOTALS FOR 15267-020				
'ACKAGE COUNT 1				
'ACKAGE CHARGES $15.00				
)ISCOUNT RECEIVED $6.25				
SPECIAL FEES $0.00				
TOTAL CHARGES $8.75				
TOTAL WEIGHT 1				
15610-010/KOEHLER	2470785371	P1	011	32.26
15610-010/KOEHLER	2470785387	OL	001	8.75

836985846	OL	ZIP	63102	001	LBS	$ 8.75	89000-001/BATES
058706081	OL	ZIP	95603	001	LBS	$ 8.75	99901-002/GREENE
318713912	SA	ZIP	10022	006	LBS	$ 7.50	22222-222/B.CHRISTENSEN
470785371	P1	ZIP	20006	011	LBS	$ 32.26	15610-010/KOEHLER
470785387	OL	ZIP	20006	001	LBS	$ 8.75	15610-010/KOEHLER
260600777	SA	ZIP	90025	001	LBS	$ 6.00	10022-058/ULMER
465316034	OL	ZIP	21202	001	LBS	$ 8.75	22222-222/STROHBEHN
470786525	OL	ZIP	97401	001	LBS	$ 8.75	22222-222/KNEBEL
465311177	OL	ZIP	98101	001	LBS	$ 8.75	11543-057/LINKON
260624753	OL	ZIP	10005	001	LBS	$ 8.75	08944-021/SZETO
554926004	SA	ZIP	92626	017	LBS	$ 19.50	11111-111/ROTH
554926013	SA	ZIP	92626	008	LBS	$ 10.50	11111-111/ROTH
465311161	CPE	ZIP	84133	002	LBS	$ 13.50	00047-081/HONENS
465312473	OL	ZIP	95841	001	LBS	$ 8.75	08261-369/FIELD
465312464	OL	ZIP	48202	001	LBS	$ 8.75	08261-369/FIELD
320561833	OL	ZIP	94583	001	LBS	$ 8.75	15267-020/SAKOL
320740814	CPE	ZIP	75251	002	LBS	$ 13.50	15749-002/FOWLER
320740823	OL	ZIP	95814	001	LBS	$ 8.75	15749-001/FOWLER
320740832	OL	ZIP	94925	001	LBS	$ 8.75	04757-004/FOWLER
320738452	SA	ZIP	62644	009	LBS	$ 10.50	22222-222/LONG
318713492	P1	ZIP	19422	006	LBS	$ 23.80	16392-001/SAVERI
470727411	OL	ZIP	95814	001	LBS	$ 8.75	17091-001/MICHELSON
470727402	OL	ZIP	20004	001	LBS	$ 8.75	15749-051/FUNK
890463086	OL	ZIP	91124	001	LBS	$ 8.75	17479-001/PICKETT
058706106	OL	ZIP	94964	001	LBS	$ 8.75	96600-007/HERR
321929511	CPB	ZIP	95448	006	LBS	$ 23.80	14482-002/MURRAY
321929502	CPB	ZIP	94525	006	LBS	$ 23.80	14482-002/MURRAY ← ★
321929554	OL	ZIP	77252	001	LBS	$ 8.75	14974-001/ALLISON
320739667	OL	ZIP	91106	001	LBS	$ 8.75	11514-001/WORTH
318714427	CPE	ZIP	07102	001	LBS	$ 12.00	11111-111/WELLS
318713072	P1	ZIP	60697	006	LBS	$ 23.80	15892-006/YAU
058701705	CPE	ZIP	91608	001	LBS	$ 12.00	11111-111/KASANIN
850934721	CPE	ZIP	10021	002	LBS	$ 13.50	11111-111/ROSCH
058720395	OL	ZIP	12231	001	LBS	$ 8.75	15892-006/BOGART
058720386	OL	ZIP	12231	001	LBS	$ 8.75	15892-006/BOGART
318713081	CPE	ZIP	97204	001	LBS	$ 12.00	15892-006/YAU
321929563	OL	ZIP	95814	001	LBS	$ 8.75	99925-008/ALLISON
259781707	P1	ZIP	92626	004	LBS	$ 19.00	11111-111/LUPTON
320740841	CPE	ZIP	77046	002	LBS	$ 13.50	15749-002/FOWLER
320739511	CPB	ZIP	60604	008	LBS	$ 27.60	13654-003/WALL
961839837	CPE	ZIP	95113	001	LBS	$ 12.00	17142-002/THEOPHILOS
320740297	OL	ZIP	48232	001	LBS	$ 8.75	08261-425/CARLETON
320740306	OL	ZIP	71201	001	LBS	$ 8.75	08261-425/CARLETON
793093245	P1	ZIP	20004	008	LBS	$ 27.60	11111-111/LUPTON

FEDERAL
EXPRESS

ACCOUNT	INVOICE	DATE	PREPARED BY
0941-0294-4	9-12850-258	12-11-1989	POWR2225

CUSTOMER INFORMATION:

McCUTCHEN DOYLE
3 EMBARCADERO CENTER
SAN FRANCISCO, CA 94111

********** SUMMARY **********

PACKAGES	44
PACKAGE CHARGES	$919.25
DISCOUNT RECEIVED	$362.34
SPECIAL FEES	$2.00
NET CHARGE =======>	$558.91

****

$558.91
NET CHARGE

****

PAYMENT IS DUE IN 15 DAYS.

MAIL PAYMENT TO :

FEDERAL EXPRESS CORPORATION
P.O. BOX 1140 DEPT. A
MEMPHIS, TN. 38101-1140

CUSTOMER REPRESENTATIVE ---------- DATE ----------

FEDERAL EXPRESS REPRESENTATIVE ---------- DATE 12/21/.

EXHIBIT 9

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

1235 Mission Street
San Francisco, CA 94103

February 13, 1990

Dee and Olleene Reynolds
1185 S. Cloverdale Blvd.
Cloverdale, California 95425

RE: United States v. TBG Inc. and Indian Head Industries, Inc.;
D.J. Ref. No. 90-11-2-188

Dear Mr. and Mrs. Reynolds:

I am writing to confirm the conversation that Valerie Lee of the Department of Justice and I had with Mr. Reynolds on February 9, 1990. We explained that the U.S. Environmental Protection Agency and the Department of Justice are willing to accept additional comments from you for an additional two week period with respect to the above-referenced matter. We also stated that any such comments would have to be postmarked by February 26th, 1990 and should be sent to the same address to which you had sent your recent comments on this matter. You stated that you had not yet seen the Consent Decree and were not sure whether you would have any additional comments.

We also informed you that the Consent Decree is available at the Cloverdale LIbrary. We explained that the Consent Decree was not available there immediately at the start of the public comment period due to the earthquake but that we had recently checked and it is there now and available to the public. We also asked you where you had read that the Consent Decree was available and you said you were not sure. We also asked you if you had read the Federal Register Notice regarding the availability of the Consent Decree and you stated that you were not sure. We hope that you will take advantage of this opportunity to submit any additional comments you may have.

Sincerely,

Marcia Preston

Marcia Preston
Assistant Regional Counsel

EXHIBIT 10

I live back of the M&M plant part of our ~~Land~~ land adjoint theirs I'm Concern about the dust during the Clean up.

I feel like it all should be Cleaned up at same time. The paper stated be Cheaper one Cleanup than going in two stages.

Mr. Mrs Dee Reynolds
28495 Redwood Hwy S
Cloverdale, Calif
95425

May 23, 1988

I live back of the MGM plant part of our ~~land~~ land adjoint theirs I'm Concern about the dust during the Clean up.

I feel like it all should be Cleaned up at same time. The paper stated be Cheaper one Cleanup than going in two Stages.

Mr. Mrs Dee Reynolds
28495 Redwood Hwy S
Cloverdale, Calif
95425

May 23, 1988

EXHIBIT 11

United States Court of Appeals
For the First Circuit

No. 89-1979

UNITED STATES OF AMERICA, ET AL.,
Plaintiffs, Appellees,

v.

CANNONS ENGINEERING CORP., ET AL.,
Defendants, Appellees.

OLIN HUNT SPECIALTY PRODUCTS, INC.,
Defendant, Appellant.

No. 89-1980

UNITES STATES OF AMERICA, ET AL.,
Plaintiffs, Appellees,

v.

CANNONS ENGINEERING CORP., ET AL.,
Defendants, Appellees.

CYN OIL CORP.,
Defendant, Appellant.

No. 89-1981

UNITED STATES OF AMERICA, ET AL.,
Plaintiffs, Appellees,

v.

CANNONS ENGINEERING CORP., ET AL.,
Defendants, Appellees.

BEGGS & COBB CORPORATION, ETC.,
Defendant, Appellant.

No. 89-1982

UNITED STATES OF AMERICA, ET AL.,
Plaintiffs, Appellees,

v.

CANNONS ENGINEERING CORP., ET AL.,
Defendants, Appellees.

SCOTT BRASS, INC.,
Defendant, Appellant.

No. 89-1983

UNITED STATES OF AMERICA, ET AL.,
Plaintiffs, Appellees,

v.

CANNONS ENGINEERING CORP., ET AL.,
Defendants, Appellees.

KINGSTON-WARREN CORPORATION,
Defendant, Appellant.

No. 89-1984

UNITED STATES OF AMERICA, ET AL.,
Plaintiffs, Appellees,

v.

CANNONS ENGINEERING CORP., ET AL.,
Defendants, Appellees.

CROWN ROLL LEAF, INC.,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

Before

Torruella and Selya, Circuit Judges,

and Bownes, Senior Circuit Judge.

Gregory L. Benik, with whom Gerald J. Petros and Hinckley, Allen, Snyder & Comen were on brief, for appellant Olin Hunt Specialty Products, Inc.

Robert C. Barber, with whom Duncan A. Maio and Looney & Grossman were on brief, for appellant Cyn Oil Corp.

Martha V. Gordon, with whom Richard C. Nelson and Merrill & Broderick were on brief, for appellant Beggs & Cobb Corporation.

John D. Deacon, for appellant Scott Brass, Inc.

Charles J. Dunn, with whom Jeffrey H. Karlin and Wadleigh, Starr, Peters, Dunn & Chiesa were on brief, for appellant Kingston-Warren Corporation.

Paul S. Samson, with whom Riemer & Braunstein was on brief, for appellant Crown Roll Leaf, Inc.

J. Carol Williams, Attorney, Department of Justice, with whom Richard B. Stewart, Assistant Attorney General, David C. Shilton, Robert Maher, and Jerry Schwartz, Attorneys, Department of Justice, Wayne A. Budd, United States Attorney, Mark Pearlstein, Assistant United States Attorney, E. Michael Thomas, Special Assistant to the General Counsel, Environmental Protection Agency, and Audrey Zucker, Assistant Regional Counsel, Environmental Protection Agency, were on brief, for the United States.

James M. Shannon, Attorney General, and Nancy E. Harper, Assistant Attorney General, on brief for Commonwealth of Massachusetts, plaintiff, appellee.

John P. Arnold, Attorney General, and George Dana Bisbee, Associate Attorney General, on brief for State of New Hampshire, plaintiff, appellee.

Robert S. Sanoff, with whom Laurie Burt and Foley, Hoag & Eliot were on brief, for twenty-five parties comprising "Cannons Sites Group," defendants, appellees.

Rosanna Sattler and Posternak, Blankstein & Lund on brief for First Londonderry Development Corp. et al., defendants, appellees.

Peter Cowan and Sheehan, Phinney, Bass & Green on brief for "Tinkham Parties," so-called, defendants, appellees.

MARCH 20, 1990

SELYA, Circuit Judge. "Superfund" sites are those which require priority remedial attention because of the presence, or suspected presence, of a dangerous accumulation of hazardous wastes. Expenditures to clean up such sites are specially authorized pursuant to 42 U.S.C. § 9611 (1987). After the federal government, through the United States Environmental Protection Agency (EPA),[1] identified four such sites in Bridgewater, Massachusetts, Plymouth, Massachusetts, Londonderry, New Hampshire, and Nashua, New Hampshire (collectively, the Sites), the EPA undertook an intensive investigation to locate potentially responsible parties (PRPs). In the course of this investigation, the agency created a de minimis classification (DMC), putting in this category persons or firms whose discerned contribution to pollution of the Sites was minimal both in the amount and toxicity of the hazardous wastes involved. See 42 U.S.C. § 9622(g) (1987). The agency staked out the DMC on the basis of volumetric shares, grouping within it entities identifiable as generators of less than one percent of the waste sent to the Sites. To arrive at a PRP's volumetric share, the agency, using estimates, constituted a ratio between the volume of wastes that the PRP sent to the Sites and the total amount of wastes sent there.

[1]Although the relevant statutes grant the authority for administering the environmental laws at issue in this case to the President, he has subdelegated that power to the Administrator of the EPA. See Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (Aug. 14, 1981), as amended by Exec. Order No. 12,418, 48 Fed. Reg. 20,891 (May 5, 1983), as further amended by Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987). For ease in reference, we refer to the EPA as the government actor.

The EPA sent notices of possible liability to some 671 PRPs, including generators and nongenerators. Administrative settlements were thereafter achieved with 300 generators (all de minimis PRPs). In short order, the United States and the two host states, Massachusetts and New Hampshire, brought suits in the United States District Court for the District of Massachusetts against 84 of the PRPs who had rejected, or were ineligible for, the administrative settlement. The suits sought recovery of previously incurred cleanup costs and declarations of liability for future remediation under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1987). The actions were consolidated.

With its complaint, the United States filed two proposed consent decrees. The first (the MP decree) embodied a contemplated settlement with 47 major PRPs, that is, responsible parties who were ineligible for membership in the DMC. This assemblage included certain generators whose volumetric shares exceeded the 1% cutoff point and certain nongenerators (like the owners of the Sites and hazardous waste transporters). The second consent decree (the DMC decree) embodied a contemplated settlement with 12 de minimis PRPs who had eschewed participation in the administrative settlement. As required by statute, notice of the decrees' proposed entry was published in the Federal Register. 53 Fed. Reg. 29,959 (Aug. 9, 1988). No comments were received.

The government thereupon moved to enter the decrees. Seven non-settling defendants objected.[2] After considering written submissions and hearing arguments of counsel, the district court approved both consent decrees and dismissed all cross-claims against the settling defendants. United States v. Cannons Engineering Corp., 720 F. Supp. 1027, 1052-53 (D. Mass. 1989). The court proceeded to certify the decrees as final under Fed. R. Civ. P. 54(b). Id. These appeals followed.

I

We approach our task mindful that, on appeal, a district court's approval of a consent decree in CERCLA litigation is encased in a double layer of swaddling. In the first place, it is the policy of the law to encourage settlements. See, e.g., Donovan v. Robbins, 752 F.2d 1170, 1177 (7th Cir. 1985); City of New York v. Exxon Corp., 697 F. Supp. 677, 692 (S.D.N.Y. 1988). That policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement. See F.T.C. v. Standard Financial Management Corp., 830 F.2d 404, 408 (1st Cir. 1987) (discussing need for judicial deference "to the agency's determination that the settlement is appropriate"); S.E.C. v.

[2]The objectors, all de minimis PRPs, included the six appellants, Olin Hunt Specialty Chemicals, Inc., Cyn Oil Corp., Beggs & Cobb Corp., Scott Brass, Inc., Kingston-Warren Corp., and Crown Roll Leaf, Inc. (Crown). Although all of them raise slightly different combinations of points, their positions are sufficiently alike that, by and large, except in Crown's case, we refrain from identifying particular arguments with particular appellants.

Randolph, 736 F.2d 525, 529 (9th Cir. 1984) (similar). While "the true measure of the deference due depends on the persuasive power of the agency's proposal and rationale, given whatever practical considerations may impinge and the full panoply of the attendant circumstances," Standard Financial, 830 F.2d at 408, the district court must refrain from second-guessing the Executive Branch.

Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance. See Exxon, 697 F. Supp. at 692. The relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute. See Durrett v. Housing Authority, No. 89-1608, slip op. at 9-10 (1st Cir. Feb. 14, 1990) (describing district court's task). Thus, the first layer of insulation implicates the trial court's deference to the agency's expertise and to the parties' agreement. While the district court should not mechanistically rubberstamp the agency's suggestions, neither should it approach the merits of the contemplated settlement de novo.

The second layer of swaddling derives from the nature of appellate review. Because approval of a consent decree is committed to the trial court's informed discretion, see id. at 7-9; United States v. Hooker Chemical & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985); In re AWECO, Inc., 725 F.2d 293, 297 (5th Cir.), cert. denied, 469 U.S. 880 (1984), the court of appeals should be reluctant to disturb a reasoned exercise of that discretion. In this context, the test for abuse of discretion is itself a fairly deferential one. We recently addressed the point in the following terms:

> Judicial discretion is necessarily broad — but it is not absolute. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

Independent Oil & Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988). Unless the objectors can demonstrate that the trier made a harmful error of law or has lapsed into "a meaningful error in judgment," Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir. 1988), a reviewing tribunal must stay its hand. The doubly required deference — district court to agency and appellate court to district court — places a heavy burden on those who purpose to upset a trial judge's approval of a consent decree.

II

With this introduction, we turn to our twice-swaddled assessment of the decrees here at issue. In beginning, we abjure

an exegetic description of the decrees themselves or of the factual/legal background upon which they are superimposed, instead referring the motivated reader to the district court's comprehensive description of the governments' claims, Cannons, 720 F. Supp. at 1031-32; the administrative settlement, id. at 1033; the MP decree, id. at 1033-34; and the DMC decree, id. at 1034-35. We note only a few of the decrees' historical antecedents.

Originally, the EPA extended an open offer to all de minimis PRPs, including five of the six appellants,[3] proposing an administrative settlement based on 160% of each PRP's volumetric share of the total projected response cost, that is, the price of remedial actions, past and anticipated. See id. at 1030 n.1. The settlement figure included a 60% premium to cover unexpected costs and/or unforeseen conditions. Settling PRPs paid their shares in cash and were released outright from all liability. They were also exempted from suits for contribution, see 42 U.S.C. § 9622(g)(5) (1987).

Following consummation of the administrative settlement, plaintiffs entered into negotiations with the remaining PRPs. These negotiations resulted in the proposed MP decree (accepted by 47 "major" defendants) and the DMC decree. The terms of the former have been memorialized in the opinion below, 720 F. Supp. at 1034, and do not bear repeating. The latter was modelled upon the

[3]Crown was ineligible to receive the initial offer because of its failure to respond to information requests. See Cannons, 720 F. Supp. at 1040 n.16.

administrative settlement, but featured an increased premium: rather than allowing de minimis PRPs to cash out at a 160% level, an eligible generator could resolve its liability only by agreeing to pay 260% of its volumetric share of the total projected response cost. The EPA justified the incremental 100% premium as being in the nature of delay damages.

With this admittedly sketchy background, we proceed with our consideration of the instant appeals, engaging in independent discussion of particular facts and decree provisions only to the extent required to afford needed perspective.

III

The lower court having made extensive, meticulously detailed findings in respect to the consent decrees, see Cannons, 720 F. Supp. at 1035-47, we see no point in repastinating well-ploughed terrain. We choose instead to set forth our general views as to the criteria that a district court should use in determining whether to approve a consent decree in the CERCLA context, explaining in the process why we believe the rulings below to be unimpugnable.

Our starting point is well defined. The Superfund Amendments and Reauthorization Act of 1986 (SARA), P.L. 99-499, § 101 et seq., 100 Stat. 1613, authorized a variety of types of settlements which the EPA may utilize in CERCLA actions, including consent decrees providing for PRPs to contribute to cleanup costs and/or to undertake response activities themselves. See 42 U.S.C. § 9622 (1987). SARA's legislative history makes pellucid that,

when such consent decrees are forged, the trial court's review function is only to "satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." H.R. Rep. No. 253, Pt. 3, 99th Cong., 1st Sess. 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3038, 3042. Reasonableness, fairness, and fidelity to the statute are, therefore, the horses which district judges must ride.

That said, we are quick to concede that these three steeds are all mutable figures taking on different forms and shapes in different factual settings. Yet, the concepts' amorphous quality is no accident or quirk of fate. We believe that Congress intended, first, that the judiciary take a broad view of proposed settlements, leaving highly technical issues and relatively petty inequities to the discourse between parties; and second, that the district courts treat each case on its own merits, recognizing the wide range of potential problems and possible solutions. When a court considers approval of a consent decree in a CERCLA case, there can be no easy-to-apply check list of relevant factors.

A. Procedural Fairness.

We agree with the district court that fairness in the CERCLA settlement context has both procedural and substantive components. Cannons, 720 F. Supp. at 1039-40. To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance. See, e.g., id. at 1040; United States v. Rohm & Haas Co., 721 F. Supp. 666, 680-81 (D.N.J. 1989); Kelley v.

Thomas Solvent Co., 717 F. Supp. 507, 517-18 (W.D. Mich. 1989); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1031 (D. Mass. 1989); Exxon, 697 F. Supp. at 693; State of New York v. Town of Oyster Bay, 696 F. Supp. 841, 844-45 (E.D.N.Y. 1988); United States v. Hooker Chemicals & Plastics Corp., 540 F. Supp. 1067, 1080 (W.D.N.Y. 1982). //

In this instance, the district court found the proposed decrees to possess the requisite procedural integrity, Cannons, 720 F. Supp. at 1040-41, and appellants have produced no persuasive reason to alter this finding. It is clear the district court believed that the government conducted negotiations forthrightly and in good faith, and the record is replete with indications to that effect. Most of appellants' contrary intimations are vapid and merit summary rejection. But their flagship argument — that the procedural integrity of the settlement was ruptured because appellants were neither allowed to join the MP decree nor informed in advance that they would be excluded — requires comment.

Appellants claim that they were relatively close to the 1% cutoff point, and were thus arbitrarily excluded from the major party settlement, avails them naught. Congress intended to give the EPA broad discretion to structure classes of PRPs for settlement purposes. We cannot say that the government acted beyond the scope of that discretion in separating minor and major players in this instance, that is, in determining that generators who had sent less than 1% of the volume of hazardous waste to the Sites would comprise the DMC and those generators who were

responsible for a greater percentage would be treated as major PRPs. While the dividing line was only one of many which the agency could have selected, it was well within the universe of plausibility. And it is true, if sometimes sad, that whenever and wherever government draws lines, some parties fall on what they may perceive as the 'wrong' side. See Sprandel v. Secretary of HHS, 838 F.2d 23, 27 (1st Cir. 1988) (per curiam). There was no cognizable unfairness in this respect. Moreover, having established separate categories for different PRPs, the agency had no obligation to let defendants flit from class to class, thus undermining the rationale and purpose for drawing lines in the first place.

Nor can we say that appellants were entitled to more advance warning of the EPA's negotiating strategy than they received. At the time de minimis PRPs were initially invited to participate in the administrative settlement, the EPA, by letter, informed all of them, including appellants, that:

> The government is anxious to achieve a high degree of participation in this de minimis settlement. Accordingly, the terms contained in this settlement offer are the most favorable terms that the government intends to make available to parties eligible for de minimis settlement in this case.

Cannons, 720 F. Supp. at 1033. Appellants knew, early on, that they were within the DMC and could spurn the EPA's proposal only at the risk of paying more at a later time. Although appellants may have assumed that they could ride on the coattails of the major parties and join whatever MP decree emerged — the government had,

on other occasions, allowed such cafeteria-style settlements – the agency was neither asked for, nor did it give, any such assurance in this instance. As a matter of law, we do not believe that Congress meant to handcuff government negotiators in CERCLA cases by insisting that the EPA allow polluters to pick and choose which settlements they might prefer to join. And as a matter of equity, we think that if appellants were misled at all, it was by their own wishful thinking.

The district court found the consent decrees to have been the product of fair play. Given that the decrees were negotiated at arm's length among experienced counsel, that appellants (except Crown, see supra note 3) had an opportunity to participate in the negotiations and to join both the first and the second de minimis settlements, and that the agency operated in good faith, the finding of procedural fairness is eminently supportable.

B. Substantive Fairness.

Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible. See generally Developments in the Law - Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1477 (1986). The logic behind these concepts dictates that settlement terms must be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done. Cf. Rohm & Haas, 721 F. Supp. at 685 (the most

important aspect of judicial review is relationship of settlement figure to proportion of settlor's waste); Cannons, 720 F. Supp. at 1043 (charging more than proportionate liability must be justified in some way, as by unexpected costs or unknown conditions); Kelley, 717 F. Supp. at 517 (approving settlement because it was unlikely that settlor's comparative fault was less than percentage of cleanup costs it agreed to pay); United States v. Conservation Chemical Co., 628 F. Supp. 391, 401 (W.D. Mo. 1985) (liability apportionment should be made on basis of comparative fault).

Even accepting substantive fairness as linked to comparative fault, an important issue still remains as to how comparative fault is to be measured. There is no universally correct approach. It appears very clear to us that what constitutes the best measure of comparative fault at a particular Superfund site under particular factual circumstances should be left largely to the EPA's expertise. Whatever formula or scheme EPA advances for measuring comparative fault and allocating liability should be upheld so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs. See United States v. Akzo Coatings, 719 F. Supp. 571, 586-87 (E.D. Mich. 1989); Acushnet, 712 F. Supp. at 1031; cf. Gardner & Greenberger, Judicial Review of Administrative Action and Responsible Government, 63 Geo. L.J. 7, 33 (1974) (courts must know why an agency has taken an action if they are to perform their review function adequately).

Put in slightly different terms, the chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of a rational basis.[4] See 42 U.S.C. § 9613(j) (1987); Rohm & Haas, 721 F. Supp. at 681.

Not only must the EPA be given leeway to construct the barometer of comparative fault, but the agency must also be accorded flexibility to diverge from an apportionment formula in order to address special factors not conducive to regimented treatment. While the list of possible variables is virtually limitless, two frequently encountered reasons warranting departure from strict formulaic comparability are the uncertainty of future events and the timing of particular settlement decisions. Common sense suggests that a PRP's assumption of open-ended risks may merit a discount on comparative fault, while obtaining a complete release from uncertain future liability may call for a premium. See, e.g., Cannons, 720 F. Supp. at 1043; Superfund Settlements with De Minimis Waste Contributors: An Analysis of Key Issues by the Superfund Settlements Project, May 8, 1987, Vol. XIV Chem.

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[4]On this issue, we believe it is appropriate to consider the adequacy of the process. To the extent that the process was fair and full of "adversarial vigor," Exxon, 697 F. Supp. at 693, the results come before the court with a much greater assurance of substantive fairness. See, e.g., Rohm & Haas, 721 F. Supp. at 694 (examining extensive discovery leading to settlement terms); Cannons, 720 F. Supp. at 1045; Acushnet, 712 F. Supp. at 1031; Oyster Bay, 696 F. Supp. at 844; see generally De Long, New Wine for a New Bottle: Judicial Review in the Regulatory State, 72 Va. L. Rev. 399, 417-18 (1986) (suggesting that courts could consider their review obligations fulfilled if they merely assured themselves that agency processes functioned adequately to inform and control discretion).

Waste Lit. Rptr. 34, 46 (June 1987) [hereinafter Superfund Settlements] (premium should be paid by PRP for benefit of being permitted to cash out). By the same token, the need to encourage (and suitably reward) early, cost-effective settlements, see, e.g., Acushnet, 712 F. Supp. at 1032 (quick settlement deserves recognition in terms of lowered settlement figure); United States v. Seymour Recycling Corp., 554 F. Supp. at 1334, 1339 (S.D. Ind. 1982) (similar), and to account inter alia for anticipated savings in transaction costs inuring from celeritous settlement, cf., e.g., Mathewson Corp. v. Allied Marine Indus., Inc., 827 F.2d 850, 855-56 (1st Cir. 1987) (discussing range of considerations influencing private settlements), can affect the construct. Because we are confident that Congress intended EPA to have considerable flexibility in negotiating and structuring settlements, we think reviewing courts should permit the agency to depart from rigid adherence to formulae wherever the agency proffers a reasonable good-faith justification for departure.

We also believe that a district court should give the EPA's expertise the benefit of the doubt when weighing substantive fairness - particularly when the agency, and hence the court, has been confronted by ambiguous, incomplete, or inscrutable information. In settlement negotiations, particularly in the early phases of environmental litigation, precise data relevant to determining the total extent of harm caused and the role of each PRP is often unavailable. See Superfund Settlements, supra p.16, at 43. Yet, it would disserve a principal end of the statute -

achievement of prompt settlement and a concomitant head start on response activities – to leave matters in limbo until more precise information was amassed. As long as the data the EPA uses to apportion liability for purposes of a consent decree falls along the broad spectrum of plausible approximations, judicial intrusion is unwarranted – regardless of whether the court would have opted to employ the same data in the same way. See Rohm & Haas, 721 F. Supp. at 685-86 (reasonable relationship to some plausible estimate or range of estimates is standard of fairness).

In this instance, we agree with the court below that the consent decrees pass muster from a standpoint of substantive fairness. They adhere generally to principles of comparative fault according to a volumetric standard, determining the liability of each PRP according to volumetric contribution. And, to the extent they deviate from this formulaic approach, they do so on the basis of adequate justification. In particular, the premiums charged to de minimis PRPs in the administrative settlement, and the increased premium charged in the DMC decree, seem well warranted.

The argument that the EPA should have used relative toxicity as a determinant of proportionate liability for response costs, instead of a strictly volumetric ranking, is a stalking horse. Having selected a reasonable method of weighing comparative fault, the agency need not show that it is the best, or even the fairest, of all conceivable methods. The choice of the yardstick to be used for allocating liability must be left primarily to the expert discretion of the EPA, particularly when the PRPs involved

are numerous and the situation is complex. See H.R. Rep. No. 99-962, 99th Cong., 2d Sess. at 253 (1986) ("[t]he President has the discretion to allocate the total response costs among potentially responsible parties as the President deems appropriate"). We cannot reverse the court below for refusing to second-guess the agency on this score.

Appellants' next asseveration — that the decrees favor major party PRPs over their less culpable counterparts — is a gross distortion. While the DMC and MP decrees differ to some extent in application of the volumetric share formula, requiring lower initial contributions under the latter, the good-faith justification for this divergence is readily apparent. In return for the premium paid, de minimis PRPs can cash out, thus obtaining two important benefits: reduced transaction costs and absolute finality with respect to the monetization of their overall liability. Cf. Superfund Settlements, supra p.16, at 42-43. The major PRPs, on the other hand, retain an open-ended risk anent their liability at three of the Sites, see Cannons, 720 F. Supp. at 1042, making any comparison of proportionate contributions a dubious proposition. At the very least, assumption of this unquantifiable future liability under the MP decree warranted some discount — and the tradeoff crafted by the government's negotiators seems reasonable. Indeed, the acceptance of the first and second DMC settlement offers by so many of the de minimis PRPs is itself an indication of substantive fairness toward the class to which appellants belong. See Seymour, 554 F. Supp. at 1339. On this

record, the district court did not misuse its discretion in ruling that the decrees sufficiently tracked the parties' comparative fault.

The last point which merits discussion under this rubric involves the fact that the agency upped the ante as the game continued, that is, the premium assessed as part of the administrative settlement was increased substantially for purposes of the later DMC decree. Like the district court, we see no unfairness in this approach. For one thing, litigation is expensive — and having called the tune by their refusal to subscribe to the administrative settlement, we think it not unfair that appellants, thereafter, would have to pay the piper. For another thing, rewarding PRPs who settle sooner rather than later is completely consonant with CERCLA's makeup.

Although appellants berate escalating settlement offers as discriminating among similarly situated PRPs, we think that the government's use of such a technique is fair and serves to promote the explicit statutory goal of expediting remedial measures for hazardous waste sites. See 42 U.S.C. § 9622(a) (1987); see also Cannons, 720 F. Supp. at 1037 (emphasizing congressional interest in expedited cleanups); see generally, Note, Superfund Settlements: The Failed Promise of the 1986 Amendments, 74 Va. L. Rev. 123, 126 (1988) (chief congressional purpose of CERCLA was to provide immediate response to threat of uncontrolled hazardous waste). That the cost of purchasing peace may rise for a laglast is consistent with the method of the statute; indeed, if the

government cannot offer such routine incentives, there will be little inducement on the part of any PRP to enter an administrative settlement. Of course, the extent of the differential must be reasonable and the graduation neither unconscionable nor unduly coercive, but these are familiar subjects for judicial review in a wide variety of analogous settings. Cf., e.g., United States v. Ven-Fuel, Inc., 758 F.2d 741, 763-64 (1st Cir. 1985) (discussing standard of review anent imposition of civil penalty for oil import violation). We believe that the EPA is entitled to make use of a series of escalating settlement proposals in a CERCLA case and that, as the district court ruled, the serial settlements employed in this instance were substantively fair.

C. Reasonableness.

In the usual environmental litigation, the evaluation of a consent decree's reasonableness will be a multifaceted exercise. We comment briefly upon three such facets. The first is obvious: the decree's likely efficaciousness as a vehicle for cleansing the environment is of cardinal importance. See Cannons, 720 F. Supp. at 1038; Conservation Chemical, 628 F. Supp. at 402; Seymour, 534 F. Supp. at 1339. Except in cases which involve only recoupment of cleanup costs already spent, the reasonableness of the consent decree, for this purpose, will be basically a question of technical adequacy, primarily concerned with the probable effectiveness of proposed remedial responses.

A second important facet of reasonableness will depend upon whether the settlement satisfactorily compensates the public

for the actual (and anticipated) costs of remedial and response measures. Like the question of technical adequacy, this aspect of the problem can be enormously complex. The actual cost of remedial measures is frequently uncertain at the time a consent decree is proposed. Thus, although the settlement's bottom line may be definite, the proportion of settlement dollars to total needed dollars is often debatable. Once again, the agency cannot realistically be held to a standard of mathematical precision. If the figures relied upon derive in a sensible way from a plausible interpretation of the record, the court should normally defer to the agency's expertise.

A third integer in the reasonableness equation relates to the relative strength of the parties' litigating positions. If the government's case is strong and solid, it should typically be expected to drive a harder bargain. On the other hand, if the case is less than robust, or the outcome problematic, a reasonable settlement will ordinarily mirror such factors. In a nutshell, the reasonableness of a proposed settlement must take into account foreseeable risks of loss. See Rohm & Haas, 721 F. Supp. at 680; Kelley, 717 F. Supp. at 517; Acushnet, 712 F. Supp. at 1028; Exxon, 697 F. Supp. at 692; Hooker, 540 F. Supp. at 1072. The same variable, we suggest, has a further dimension: even if the government's case is sturdy, it may take time and money to collect damages or to implement private remedial measures through litigatory success. To the extent that time is of essence or that transaction costs loom large, a settlement which nets less than

full recovery of cleanup costs is nonetheless reasonable. See Rohm & Haas, 721 F. Supp. at 680 (interpreting "reasonableness" in light of congressional goal of expediting effective remedial action and minimizing litigation); United States v. McGraw-Edison Co., 718 F. Supp. 154, 159 (W.D.N.Y. 1989) (settlement reasonable in light of prospect of protracted litigation as contrasted to expeditious reimbursement and remedy); Acushnet, 712 F. Supp. at 1030 (emphasizing that trial would likely be "complex, lengthy, expensive and uncertain"); Exxon, 697 F. Supp. at 693 (noting benefit of immediate payment to environmental cleanup effort); Seymour, 534 F. Supp. at 1340 (urgency of abating danger to public must be considered). The reality is that, all too often, litigation is a cost-ineffective alternative which can squander valuable resources, public as well as private.

In this case, the district court found the consent decrees to be reasonable. Cannons, 720 F. Supp. at 1038-39. We agree. Appellants have not seriously questioned the technological efficacy of the cleanup measures to be implemented at the Sites. Insofar as they contend that the settlements are not designed to assure adequate compensation to the public for harms caused – at times, they seem to argue that the settlements overcompensate – they are whistling past the graveyard. The risks of trial and the desirability for expedition seem to have been blended into the mix. See id. at 1039. Given the totality of the record-reflected circumstances, the lower court's finding of reasonableness strikes us as irreproachable.

D. Fidelity to the Statute.

Of necessity, consideration of the extent to which consent decrees are consistent with Congress' discerned intent involves matters implicating fairness and reasonableness. The three broad approval criteria were not meant to be mutually exclusive and cannot be viewed in majestic isolation. Recognizing the inevitable imbrication, we turn to the final criterion.

We have recently described the two major policy concerns underlying CERCLA:

> First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982)). The district court thought that these concerns were addressed, and assuaged, by the proposed settlements. So do we.

It is crystal clear that the broad settlement authority conferred upon the EPA must be exercised with deference to the statute's overarching principles: accountability, the desirability of an unsullied environment, and promptness of response activities. The bases appear to have been touched in this instance. Appellants concede that the government made a due and diligent search to uncover the identity of PRPs; the classification of perpetrators

and the use of a modified volumetric share formula appear reasonably related to assuring accountability; the settlements will unarguably promote early completion of cleanup activities; and the technical efficacy of the selected remedial measures is not in issue. On this basis, the consent decrees seem fully consistent with CERCLA.

One can, of course, conjure up ways in which particular consent decrees, while seemingly fair and reasonable, might nevertheless contravene the aims of the statute. Rather than attempting to catalogue a virtually endless list of possibilities, we address, in terms of what we discern to be the congressional will, certain points raised by the appellants.

1. De Minimis Settlements. In the SARA Amendments, Congress gave the EPA authority to settle with a de minimis PRP so long as (i) the agreement involved only a "minor portion" of the total response costs, and (ii) the toxicity and amount of substances contributed by the PRP were "minimal in comparison to the other hazardous substances at the facility." 42 U.S.C. § 9622(g)(1) (1987). The two determinative criteria are not further defined. Appellants, for a variety of reasons, question the boundaries fixed for the DMC class in this instance, contending that drawing lines so sharply, and adhering to those lines so blindly, thwarts CERCLA's legitimate goals.

We have already dealt with the burden of this argument, see supra Parts III(A), (B), and need not linger at this juncture. It suffices to say that, had Congress meant the agency to employ

a purely mechanical taxonomy, it would have so provided. We believe that Congress intended quite the opposite; the EPA was to have substantial discretion to interpret the statutory terms in light of both its expertise and its negotiating strategy in a given case. Therefore, in attempting to gauge a consent decree's consistency with the statute, courts must give a wide berth to the agency's choice of eligibility criteria. In this case, the criteria selected fell well within the ambit of Executive discretion.

2. Disproportionate Liability. In the SARA Amendments, Congress explicitly created a statutory framework that left non-settlors at risk of bearing a disproportionate amount of liability. The statute immunizes settling parties from liability for contribution and provides that only the amount of the settlement -- not the pro rata share attributable to the settling party -- shall be subtracted from the liability of the nonsettlors.[5] This can prove to be a substantial benefit to settling PRPs -- and a corresponding detriment to their more recalcitrant counterparts.

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[5]The statute provides:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f)(2) (1987).

Although such immunity creates a palpable risk of disproportionate liability, that is not to say that the device is forbidden. To the exact contrary, Congress has made its will explicit and the courts must defer. See Exxon, 677 F. Supp. at 694 ("To the extent that the non-settling parties are disadvantaged in any concrete way by the applicability of [42 U.S.C. § 9613(f)(2)] to the overall settlement, their dispute is with Congress."); Acushnet, 712 F. Supp. at 1032. Disproportionate liability, a technique which promotes early settlements and deters litigation for litigation's sake, is an integral part of the statutory plan.

In a related vein, appellants assail the district court's dismissal of their cross-claims for contribution as against all settling PRPs. They contend, in essence, that the district court failed to appreciate that they would potentially bear a greater proportional liability than will be shouldered by any of the settling parties. They claim this result to be both unfair and inconsistent with the statutory plan.

As originally enacted, CERCLA did not expressly provide for a right of contribution among parties found jointly and severally liable for response costs. When CERCLA was amended by SARA in 1986, Congress created an express right of contribution among parties found liable for response costs. See 42 U.S.C. § 9613(f)(1) (1987). Congress specifically provided that contribution actions could not be maintained against settlors. See 42 U.S.C. § 9613(f)(2) (1987). This provision was designed to

encourage settlements and provide PRPs a measure of finality in return for their willingness to settle. See H.R. Rep. No. 90-253, Part I, 90th Cong., 1st Sess. 80 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2862. Congress plainly intended non-settlors to have no contribution rights against settlors regarding matters addressed in settlement. Thus, the cross-claims were properly dismissed; Congress purposed that all who choose not to settle confront the same sticky wicket of which appellants complain.

The statute, of course, not only bars contribution claims against settling parties, but also provides that, while a settlement will not discharge other PRPS, "it reduces the potential liability of the others by the amount of settlement." 42 U.S.C. § 9613(f)(2) (1987). The law's plain language admits of no construction other than a dollar-for-dollar reduction of the aggregate liability. The weight of considered authority so holds. See, e.g., Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988), cert. denied, 109 S. Ct. 837 (1989) (under SARA, a settlement with the government reduces the government's claim against non-settlors "pro tanto"); Rohm & Haas, 721 F. Supp. at 699-700; Acushnet, 712 F. Supp. at 1027; Exxon, 697 F. Supp. at 681 n.5. This clear and unequivocal statutory mandate overrides appellants' quixotic imprecation that their liability should be reduced not by the amount of settlement but by the equitable shares of the settling parties. In a very real sense, the appellants' arguments are with Congress, not with the

district court.[6]

3. Indemnity. On a similar note, appellants bemoan the dismissal of their cross-claims for indemnity against the settling PRPs. We are unmoved. Although CERCLA is silent regarding indemnification, we refuse to read into the statute a right to indemnification that would eviscerate § 9613(f)(2) and allow non-settlors to make an end run around the statutory scheme.

Appellants allege no contractual basis for indemnification. Their noncontractual indemnity claim, by definition and extrapolation, "is in effect only a more extreme form of [a claim for] contribution." Drake v. Raymark Industries, Inc., 772 F.2d 1007, 1011 n.2 (1st Cir. 1985), cert. denied, 476 U.S. 1126 (1986); accord Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 718-19 (2d Cir. 1978). Clearly, if appellants' claims for partial contribution can validly be barred in the course of implementing a CERCLA settlement, see supra Part III(D)(2), their claims for total contribution, i.e., indemnity, can likewise be foreclosed.

4. Notice. The appellants also contend that the government's negotiating strategy must be an open book. We disagree. Congress did not send the EPA into the toxic waste ring with one arm tied behind its collective back. Although the EPA may not mislead any of the parties, discriminate unfairly, or engage

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[6]The veiled constitutional argument sponsored principally by Kingston-Warren does not withstand scrutiny. There is no federal common law right to contribution, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641-42 (1981); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 90-91 (1981), and hence, no deprivation of any constitutionally protected interest.

in deceptive practices, neither must the agency spoon feed PRPs. In the CERCLA context, the government is under no obligation to telegraph its settlement offers, divulge its negotiating strategy in advance, or surrender the normal prerogatives of strategic flexibility which any negotiator cherishes. In short, contrary to the objectors' thesis, the EPA need not tell de minimis PRPs in advance whether they will, or will not, be eligible to join ensuing major party settlements.

5. Exclusions from Settlements. The CERCLA statutes do not require the agency to open all settlement offers to all PRPs; and we refuse to insert such a requirement into the law by judicial fiat. Under the SARA Amendments, the right to draw fine lines, and to structure the order and pace of settlement negotiations to suit, is an agency prerogative. After all, "divide and conquer" has been a recognized negotiating tactic since the days of the Roman Empire,[7] and in the absence of a congressional directive, we cannot deny the EPA use of so conventional a tool. So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses.

6. Crown. Appellant Crown raises an argument unique to it. The facts are these. In 1986 and thereafter Crown failed to comply with EPA's requests for information and documents concerning the amount and nature of the waste it had sent to the Sites. The

[7]The maxim, much cited by Macchiavelli, appears in the original Latin as "divide et impera." It is more accurately translated as "divide and rule."

information requests were authorized by statute, see 42 U.S.C. §§ 6927, 9604(e) (1987), and all PRPs were on notice that compliance therewith was a condition precedent to participation in any class settlement. Crown nonetheless disdained compliance. Eventually, the government had to file suit to obtain the information.

Crown argues that it was unfairly subjected to a double penalty because withholding the information resulted both in its exclusion from the settlements and in the imposition of bad-faith penalties. We see nothing amiss. EPA's authority to enforce § 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6927 (1987), and CERCLA § 104(e), 42 U.S.C. § 9604(e) (1987), is completely independent of its authority to settle Superfund cases. Conditioning settlement eligibility on a PRP's compliance with an outstanding information request was a perfectly reasonable approach, especially since the data Crown refused to supply was the data necessary to verify the nature and amount of the wastes sent to the Sites, and thus provide a foundation for settlement.

We draw this phase of our inquiry to a close. The district court held unequivocally that "the proposed Consent Decrees are consistent with the Constitution and CERCLA." Cannons, 720 F. Supp. at 1037. Appellants have offered no convincing reason why this ruling should be set aside.

IV

Appellants complain that the district court erred in failing to hold an evidentiary hearing on the suitability of the consent decrees. They are wrong.

We review a district court's declination to convene an evidentiary hearing on a confirmation motion only for abuse of discretion. Cf., e.g., HMG Property Investors, Inc. v. Parque Industrial Rio Canas, Inc., 847 F.2d 908, 919 (1st Cir. 1988) (abuse of discretion standard used in determining whether a hearing was required on entry of default judgment); United States v. DeCologero, 821 F.2d 39, 44 (1st Cir. 1987) (same standard for motion for reduction of sentence). We start with the proposition that "motions do not usually culminate in evidentiary hearings." Aoude v. Mobil Oil Corp., No. 89-1690, slip op. at 11 (1st Cir. Dec. 29, 1989) (Aoude II). That being so, it rests with the proponent of an evidentiary hearing to persuade the court that one is desirable and to offer reasons warranting it. See, e.g., DeCologero, 821 F.2d at 44 (evidentiary "hearings cannot be convened at the whim of a suitor, made available like popsicles in July, just because a passerby would like to have one"). District courts are busy places and makework hearings are to be avoided.

In general, we believe that evidentiary hearings are not required under CERCLA when a court is merely deciding whether monetary settlements comprise fair and reasonable vehicles for disposition of Superfund claims. Accord Rohm & Haas, 721 F. Supp. at 686; Acushnet, 712 F. Supp. at 1031 n.21 ("to grant inevitably lengthy hearings in [CERCLA cases] would either frustrate the express intent of Congress to encourage settlement or negate the benefits of . . . settlement"). As in other cases, the test for granting a hearing "should be substantive: given the nature and

circumstances of the case, did the parties have a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions?" Aoude v. Mobil Oil Corp., 862 F.2d 890, 894 (1st Cir. 1988) (Aoude I). In this case, that inquiry must be answered in the affirmative. There was no showing of any substantial need for an evidentiary hearing. The issues were fully argued and compendiously briefed. We have been advised of no particular matter which, fairly viewed, necessitated live testimony. The district court's determination that no evidentiary hearing was required fell well within the realm of the court's discretion. See, e.g., Aoude II, slip op. at 12; Morales-Feliciano v. Parole Board, 887 F.2d 1, 6-7 (1st Cir. 1989); Aoude I, 862 F.2d at 893-94 (describing representative cases).

V

Although the appellants have posited a host of other arguments, we deem discussion of them unnecessary. A district court, faced with consent decrees executed in good faith and at arm's length between the EPA and counselled polluters, must look at the big picture, leaving interstitial details largely to the agency's informed judgment. Once the district court has performed this tamisage, we must, absent mistake of law, be doubly deferential, respecting both the agency's expertise and the trial court's sound discretion. We may still intervene if an abuse of discretion looms - but we will not lightly disturb the lower court's approval of such a decree.

In this instance, the district court proceeded with

evident care. Its conclusion that the decrees, as proposed, are fair, reasonable, and faithful to CERCLA's purposes is fully supportable. The district court considered the appropriate factors and appears to have weighed them in a completely acceptable manner.

We need go no further. Although appellants may suffer adverse effects from the consummation of the settlements embodied in the decrees, those effects stem not from any systemic unfairness but from the combination of Congress' plan and appellants' own conduct (including their negotiating strategy).

Affirmed.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

EXHIBIT 12

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

Plaintiff.

- against -

MATTIACE INDUSTRIES, INC., CARGO TRUCKING, INC., AND INTERSTATE CIGARS COMPANY, INC.

Defendants.

----------x

CV-86-1792 (HB)

DECISION AND ORDER NO. 1

[This opinion retyped by CWLR]

Docket Entry	Date of Document	Description
87	6/12/87	Motion by Interstate to reconsider
88	6/12/87	Memo supporting #87
89	6/15/87	Motion by Mattiace to reconsider
90	6/15/87	Memo supporting #89
	6/26/87	Govt's opposing Memo w/pp 30-35 replaced 6/29
93	6/22/87	Interstates's Reply Memo
	7/13/87	Interstate's Second Reply Memo
	7/17/87	Govt's letter to Magistrate
	7/24/87	Interstate's Third Reply to Memo
	7/27/87	Letter of Interstate's counsel in response to Govt's letter of 7/17/87
	8/4/87	Govt's "follow-up" to its letter of 7/17/87 w/ attachments
	8/18/87	Govt's letter withdrawing its prayer for injunctive relief
	8/31/87	Govt's letter attaching *US v. Rohr & Haas*

These are two identical motions, one by defendant Interstate Cigar Co., Inc., (Interstate) and one by defendant Mattiace Industries, Inc., (Mattiace) for reargument of that portion of Part V of Decision and Order No. 2 herein dated May 22, 1987, filed June 1, 1987, which ruled that the issue of whether the plaintiff's response to the MEK spill here in question was consistent with the requirements of the Environmental Protection Act is to be reviewed on the basis of the administrative record under the arbitrary and capricious standard of review. In its opposing papers, the plaintiff also seeks review of the same portion of that order. It also, in effect, seeks reargument of the remainder of Part V which denied its request to preclude discovery proceedings on this issue until the court should order that they be permitted.

The motions are decided on the following papers:

Reargument is granted in all respects. It is not disputed that the motions by Interstate and Mattiace were timely, having been made within ten days after the decision and order was filed. 28 U.S.C. 636(b), Rule 4(a)(e), F.R.Civ.P. Interstate properly notes that the Government never expressly moved for reargument, but buried its request in its opposing papers. Those papers were served long after the ten-day period had expired. However, the issues controlled by the two rulings contained within Part V of the decision and order are in fact so interrelated that, on the court's own motion, reargument is granted on the entire matter.

The moving defendants argue that the Government's underlying motion should not have been entertained at all because it lacked a return date. However, by order dated September 16, 1986, the parties were advised that motions in letter form would be deemed to be submitted in accordance with a schedule stated therein. A motion without a stated return date, such as this one, is tantamount to such a motion and was handled as such.

Part V of Decision and Order No. 2 dated May 22, 1987, is withdrawn and the following is substituted in its place.

This is a motion by the Government, the plaintiff, for a pretrial ruling that "1) response issues are to be reviewed on the basis of the administrative record under the arbitrary and capricious standard of review; and 2) no discovery relating to response issues shall occur unless and until the court issues an order permitting such discover." (Oral argument is requested, but is denied.) "Response issues" are defined as issues directive to the question of whether the plaintiff's response to the MEK spill was consistent with the requirements of the Environmental Protection Act. Movant argues that review of its actions is limited to a review of the administrative record under traditional standards and that underlying actions not contained therein are

irrelevant unless it is first shown that the record is inadequate. It is noted that the plaintiff has withdrawn its claim for injunctive relief and now simply seeks reimbursement of the expense it incurred in completing the cleanup of the MEK spill. The extensive briefing on the injunctive aspect of this case has become moot.

The plaintiff's "response" to the MEK spill had three aspects. First, plaintiff decided what had to be done. Second, it decided who should do it. Third, when the work was not done by those parties, the plaintiff did the work itself.

The first and second decisions were made on the basis of an investigation which is now contained in the administrative record. The plaintiff agrees that the issue of who is to do the work is a liability issue which is to be tried de novo in this court. It also seems apparent that the work ultimately done by the Government to clean up the spill is not contained in the administrative record. Whether the work was "not inconsistent" with the Environmental Protection Act does not depend on the contents of the administrative record. Therefore, these issues are not within the scope of the present motion. In short, the "response" issue in question is limited to the Government's determination of what had to be done.

It would serve no useful purpose to repeat all the arguments raised in the papers before the court. Suffice it so say that it is now reasonably well settled that the moving defendants received reasonable notice of an opportunity to be heard. They were given fourteen (14) days notice of the proposed action during which time they were permitted to raise objections. They failed to present any reason why the proposed action was defective in any way. Indeed, they have not done so to this day.

The moving defendants also argue that inasmuch as they were not brought into the administrative proceeding until the very end, they were not in a position to ascertain whether the administrative record was properly developed in the first instance, or whether the record, as presently constituted, is complete. The Government does not claim that these defendants are not entitled to explore these issues. It only asks that discovery into them be precluded unless a proper basis for it is presented. As presently constituted, the papers before the court give no substantial reason to conclude that the administrative proceedings were defective or that the administrative record is incomplete. The defendants are not entitled to relitigate the administrative decision in any event. In the present posture of the case, discovery proceedings into these issues would seem to be based solely on the hope that something helpful might turn up. This is insufficient.

For the foregoing reasons, the motion by the plaintiff is granted to the extent that the issue of whether its determination of what had to be done to clean up the spill was consistent with the Environmental Protection Act is to be reviewed on the basis of the administrative record under the arbitrary and capricious standard There should be no discovery on this aspect of the response without further court order. To the extent the plaintiff may be seeking greater relief, the motion is denied.*

SO ORDERED.

Dated: Hauppauge, New York
September 24, 1987

/s/
DAVID F. JORDAN, U.S.M

* The magistrate's law clerk took no part in the preparation of this decision.

EXHIBIT 13

Chemical Waste Litigation Reporter

Suite 200, 1519 Connecticut Ave., N.W., Washington, D.C. 20036

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
v.	:	NO. 85-3060
NICOLET, INC.	:	
v.	:	
TURNER & NEWALL PLC	:	

OPINION

BRODERICK, J. MAY 11, 1987

In this action brought by the United States pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, et seq., the defendant, Nicolet, Inc., has noticed the depositions of Rob Turpin, Dr. Joseph LaFornara, Andrew Zownir, Tim Travers, Charles Walters and the Franklin Institute Research Laboratories. The United States has moved for protective orders to prevent the depositions on the ground that the depositions are being sought for the purpose of taking discovery beyond the administrative record on issues for which review is limited to matters covered by the administrative record. Nicolet contends that judicial review in this action cannot be limited to the administrative record "since no record exists and Nicolet must be given an opportunity to present evidence in support of its defense." For the reasons that follow, the government's motions for protective orders will be granted.

This action was brought by the United States pursuant to CERCLA to recover approximately $700,920.96 expended by the United States Environmental Protection Agency ("EPA") in removal and response costs associated with two asbestos-containing waste piles known as the "Locust Street Pile" and the "Plant Pile" on Nicolet's property in Ambler, Pennsylvania. In prior litigation between the United States and Nicolet, Nicolet v. Eichler, No. 84-0271, in the Eastern District of Pennsylvania, Judge Newcomer entered an order on March 26, 1984, giving the United States access to premises owned by Nicolet in Ambler, Pennsylvania pursuant to CERCLA. The United States entered the property pursuant to the order and, among other measures, covered over and hydroseeded a 16-acre "mountain" of asbestos-containing material. The present litigation seeks recovery of costs incurred by the United States at the Nicolet property.

Prior to obtaining the order in aid of access to the Nicolet site in 1984, the EPA compiled an administrative record in support of its position that it had the right to enter the premises and take the proposed action. That administrative record was filed with the court prior to the hearing held March 26, 1984. Nicolet received a copy of the administrative record on March 23, 1984. The administrative record contains the factual basis for EPA's determination that there was a release or threat of release of hazardous substances from the Nicolet site and that there existed an imminent and substantial endangerment to health and the environment. The administrative record was compiled by EPA staff attorney Joseph

Melvin, with assistance from EPA On-Scene Coordinator Bruce Potoka, both of whom have been deposed by Nicolet. The administrative record includes documents to which Mr. Melvin had access and memoranda of meetings in connection with the action at the Nicolet site prepared by EPA employees who were involved in those meetings. The administrative record appears to include all documents, even those which might be considered as unfavorable to the EPA's determination to enter the site and incur removal and response costs.

On December 29, 1986, Nicolet noticed the depositions of Rob Turpin, Dr. Joseph LaFornara, Tim Travers, Charles Walters and Andrew Zownir. Turpin, LaFornara and Zownir are former employees of the EPA and were members of an Environmental Response Team. Nicolet wants to depose them to determine the basis of their opinions and to learn what information they relayed to Mr. Potoka and Mr. Pike, the EPA On-Scene Coordinators. Mr. Walters was the Region III representative of the Center for Disease Control and worked with Dr. Jeffrey Lybarger, who issued a health advisory in connection with the Nicolet site. Nicolet seeks Mr. Walters' deposition in order to discern what information was exchanged between Mr. Walters and Dr. Lybarger. Mr. Travers was a representative of the contractor who worked with the EPA On-Scene Coordinators at the Nicolet site. Nicolet states that Mr. Travers directed and conducted the testing and sampling at the Nicolet site, was involved in the negotiations with Nicolet; and played a key role in determining what action the

government would take. Nicolet alleges that it needs to take Mr. Travers' deposition in order to clarify the critical role he played in this case, to obtain a more detailed description of the sampling protocol used and to learn whether Mr. Travers had the benefit of historical information which indicated that no danger existed at the Nicolet site.

On January 21, 1987 Nicolet noticed the depositions of Franklin Institute Research Laboratories, Princeton Testing Laboratory and Kaselaan & D'Angelo Associates. These three companies conducted testing on samples taken from the Nicolet site. The depositions of Princeton Testing and Kaselaan & D'Angelo have already been taken. The Franklin Institute Research Laboratories analyzed waste pile materials and soil samples collected on or near the Nicolet site prior to the EPA decision to take action at the site. The administrative record compiled by the EPA in support of its decision to take action at the Nicolet site contains the reports from all three of these testing laboratories. In addition, Nicolet has taken a three-day deposition of the EPA's On-Scene Coordinator, Bruce Potoka, concerning his request for analyses from the three laboratories, the results of the analyses, the use he made of the results and the persons he consulted with respect to the results. Nicolet contends that the results of the Franklin Institute's report reveal that no asbestos was present in a sample fiber removed from a picnic table adjacent to the Locust Street Pile. Nicolet asserts that a deposition of the Franklin Institute is necessary to

determine if and when the government was informed of the test results.

The initial inquiry, which must precede a determination of the government's motions for protective orders, must focus on the scope of this court's review. It is clear that this Court is not empowered to substitute its judgment for that of the agency and that an agency's decision is entitled to a presumption of regularity. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-17, 91 S.Ct. 814, 823-24 (1971). Evidence weighing must be left to the agency making the decision. Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976). As stated by Judge Skelly Wright in Ethyl Corp., "It is settled that we must affirm decisions with which we disagree ...." Id. at 36. However, the deference owed to an agency by a reviewing court does not shield the agency's action from a thorough, probing and in-depth review. Overton Park, 401 U.S. at 415, 91 S.Ct. at 823; American Iron & Steel Institute v. Environmental Protection Agency, 568 F.2d 284, 296 (3d Cir. 1977). Section 10(e)(2)(A) of the Administrative Procedure Act, 5 U.S.C. §706(2)(A), provides that the reviewing court shall:

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> ...

In delineating this standard of review the Supreme Court in Overton Park stated:

> To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.... Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

491 U.S. at 416-17, 91 S.Ct. at 823-24. Accord Lukens Steel v. Klutznick, 629 F.2d 881, 885 (3d Cir. 1980); Doraiswamy v. Secretary of Labor, 555 F.2d 832, 840 (D.C. Cir. 1976). There can be no doubt, and the parties do not dispute, that this is the standard to be used by the court in reviewing the EPA's decision to take action at the Nicolet site. Lukens Steel, supra, 629 F.2d at 885; United States v. Ward, 618 F. Supp. 884, 900 (E.D.N.C. 1985); United States v. The Western Processing Co., No. C83-252M (W.D. Wash. Feb. 19, 1986). The parties disagree, however, as to whether the Court is limited to the administrative record, or whether material outside of the record should be considered.

It is clear that in applying the arbitrary and capricious standard, "the focal point should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244 (1973). An administrative agency's action is to be reviewed on the basis of that which is in the administrative record. Florida Power and Light Company v. Lorion, 105 S.Ct. 1598, on remand, 785 F.2d 1038 (D.C. Cir. 1985); American Iron & Steel, supra, 568 F.2d at 296. The reviewing court cannot supply alternative reasons for agency action, nor can it attack or support the agency action

with new evidence. Dry Color Manufacturers' Association, Inc. v. Department of Labor, 486 F.2d 98, 104 n.8 (3d Cir. 1973); Doraiswamy, supra, 555 F.2d at 840.

Subsequent to the commencement of this action, Congress amended CERCLA with the Superfund Amendments and Reorganization Act which became effective on October 17, 1986. Section 113(j) of CERCLA, 42 U.S.C. §9613(j), as amended, now provides:

> (j) Judicial review
> (1) Limitation
> In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.
> (2) Standard
> In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.
> (3) Remedy
> If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

As a general rule, a court must "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. Richmond School Board, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016 (1974). Nothing in the amendments or the legislative history indicates that the amendments were not intended to be applied retroactively. Statutory amendments making procedural changes that do not affect substantive or vested rights are applied to pending cases. Sperling v. United States, 515 F.2d 465, 473-4 (3d Cir. 1975), cert. denied, 426 U.S. 919 (1976); Koger v. Ball, 497 F.2d 702 (4th Cir. 1974). Because the amendments in question merely clarify the limitation on judicial review, the applicable standard of review and the remedies available upon judicial review, no substantive or vested rights are affected and the amendments are applicable to this action. There can be no doubt that Congress intended that EPA action taken pursuant to CERCLA be reviewable based upon the administrative record under the arbitrary and capricious standard. The case law and statutes make it clear that the Court is required to confine its review of the EPA's action to the administrative record.

The Supreme Court has recognized certain limited circumstances in which the reviewing court may order supplementation of the administrative record. One such circumstance is when the administrative record does not disclose the factors that were considered or the agency's construction of the evidence. Overton Park, 401 U.S. at 420, 91 S.Ct. at 825. The court may require the officials who made the decision to give testimony explaining this action. Id. However, where the agency has compiled an administrative record contemporaneously with its administrative decision, "there must be a strong showing of bad faith or improper behavior before such inquiry may be made." Id. Another circumstance recognized by the Supreme Court where the court may

order supplementation of the administrative record is whenever, after reviewing the record, the court finds that the agency's asserted reasons for its decision are inadequate. Camp v. Pitts, 411 U.S. at 142-43, 93 S.Ct. at 1244. If the court finds the reasons asserted are inadequate, it may either remand the matter to the agency, or it may "obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." Id. at 143, 93 S.Ct. at 1244. In both circumstances, the court may obtain from the agency supplemental reasons for its decision.

Nicolet's vague assertions that the administrative record does not disclose the factors considered by the EPA or the agency's construction of the evidence, and that the reasons given by the agency are inadequate, are unfounded. Indeed, Nicolet seeks discovery on a broad range of issues far beyond those contained in the administrative record which do not fall within the exceptions discussed above. The reasons for taking the Franklin Institute Laboratories' deposition, i.e., to determine if and when the government was informed of the test results, do not provide a basis for permitting that deposition. As heretofore pointed out, the Franklin Institute report is in the administrative record and the government's use of it will be reviewed on the basis of other information in the record. Neither the government nor Nicolet is permitted to present post hoc rationalizations concerning the decision to take action at the Nicolet site. The Court will only

consider the factual findings and reasoning of the agency contained in the administrative record. Similarly, the reasons offered in support of taking the five individuals' depositions -- i.e., to determine the basis of their opinions, to learn what information they give to the EPA, to learn what sampling protocol was utilized -- are insufficient. Again, the agency action must stand on that which is in the administrative record. Evidence outside of the record, offered by either party, may not be considered by the court in reviewing the agency decision. Nicolet has presented no compelling reason why in this case the Court should allow the depositions to proceed. The government's motions for protective orders will be granted.

As heretofore pointed out, the three exceptions for supplementation of the administrative record are not present here. Although we are not now ruling on the propriety of the EPA's actions, the Court has made a cursory review of the administrative record, which appears to be a detailed compilation of the facts, evidence and circumstances leading up to the EPA's decision to take action at the Nicolet site. The depositions sought by Nicolet would not shed any light on the construction of the evidence by the EPA, on factors not relied upon by the EPA or on the adequacy of the EPA's explanation. If, upon review by this Court, supplementation of the administrative record becomes necessary, the Court will take the appropriate action.